

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B119

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BRIEN COLLIER,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Hearing was held on April 23, 1997, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Steven A. Chavez, Assisted Attorney General. Complainant represented himself.

Respondent called three witnesses: Thomas Holladay, Highway Maintenance Worker I; Leon Garcia, Highway Maintenance Worker II; Larry Warner, Director, Region 6, Colorado Department of Transportation. Complainant testified in his own behalf and called no other witnesses.

Respondent's Exhibits 1 and 3 through 6 were stipulated into evidence. Exhibit 2 was admitted over objection. Complainant's Exhibit C was admitted by stipulation. Exhibit E was admitted without objection. Exhibits B and F were admitted over objection. Exhibits A and D were not admitted.

MATTER APPEALED

Complainant appeals a one-month reduction in pay from Grade 73, Step 6 to Grade 73, Step 5.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority.

PRELIMINARY MATTERS

The administrative law judge was hospitalized on May 13, 1997 and subsequently entered an extended period of sick leave. On June

10, 1997, a case status conference was held before Judge Jones whereupon the parties, expressing a desire to have the initial decision issued by the original judge, agreed to waive any challenges to the timeliness of the initial decision.

On April 24, 1997, the day after the evidentiary hearing, complainant submitted several documents to the State Personnel Board. These post-hearing submissions were not considered by the administrative law judge as evidence in the case and should not be made part of the evidentiary record.

FINDINGS OF FACT

1. Complainant Brien Collier has been employed by respondent Department of Transportation (DOT) as a Highway Maintenance Worker I for more than seven years.

2. On the night shift of January 29, 1997, Collier was working with Thomas Holladay on I-70 and I-270. Collier was the sweeper operator and Holladay drove the accompanying dump truck, receiving the sweepings. They had worked together for approximately three months without incident.

3. During the course of the shift, complainant became agitated because he felt that Holladay was taking too long and was not keeping up with him. He talked to lead worker Leon Garcia by phone and in person and asked that an additional dump truck be assigned to the shift. Garcia determined that this was not necessary.

4. There were several verbal confrontations between Collier and Holladay. Holladay alleged that Collier poked a finger into his chest and four or five times and called him an "asshole." At one point, Collier stood on the running board of the truck and yelled at Holladay through the window, tapping on the window. Holladay had rolled up the window and locked the door to keep Collier away. He felt some fear and was intimidated by Collier.

5. Lead worker Garcia talked to both Collier and Holladay at different times during the shift. Holladay told him that Collier was hollering aggressively and poked him in the chest. Collier stated that they had yelled at each other and denied the finger-poking allegation.

6. Garcia found Collier "disturbingly tense." He concluded that there had been problems between Collier and Holladay, that they had argued, but was left with the impression that everything would be okay for the duration of the shift. He believed Holladay when he said that Collier had poked him and called him an asshole.

7. The shift ended at 6:00 a.m. on January 30. At 8:00 a.m., Holladay filed a complaint at the DOT Equal Employment

Opportunity (EEO) office describing the events as he perceived them to be and alleging that Collier was the aggressor. (Exhibit 2.) Holladay then took a couple of days off work because he felt stressed out over the incident. Collier and Holladay have not worked together since.

8. Larry Warner, DOT Region 6 Director and appointing authority in this matter, read the EEO report filed by Holladay and instructed Micki Perez, an EEO representative to investigate the incident.

9. Warner decided to conduct a predisciplinary meeting with Collier because he believed that Collier's conduct may have violated the written DOT Workplace Violence Policy made effective on December 21, 1995.

10. The R8-3-3 meeting was held on February 18, 1997. Collier stated that both he and Holladay had used the term "asshole" and that Holladay was the initial aggressor. He denied poking Holladay.

11. Warner did not reach a conclusion on whether the poking allegation occurred. He decided to impose discipline based upon his conclusion that Collier had violated the workplace violence policy (Exhibit 5) through verbal aggression. He felt that Collier's conduct was inappropriate in the workplace and very serious because of the potential for escalation to physical violence. Warner noted that Collier had attending a two-hour training session on the workplace violence policy on October 8, 1996.

12. By letter dated February 26, 1997, the appointing authority imposed on Collier a disciplinary action of a one-month pay reduction from Grade 73, Step 6 to Grade 73, Step, in the amount of \$117.00. (Exhibit 1.)

13. Complainant filed a timely appeal on March 7, 1997.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S.

The credibility of witnesses and the weight to be given their testimony are within the province of the administrative law judge.

Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept part's of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part, or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

It is the role of the administrative law judge to weigh the evidence and from the evidence reach a conclusion. The weifgt of the evidence is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in unducing a belief. The preponderance of the evidence standard, as used in this administrative proceeding, requires the fact finder to be convinced that the factual conclusion he chooses is more likely than not.

Complainant contends that Holladay initiated everything and that Holladay is a liar. Complainant submits that Holladay was not afraid of him or intimidated by him, as he claims. The evidence suggests otherwise. Both Collier and Holladay testified that Holladay rolled up his window and locked the door when Collier stood on the running board of the truck. This event supports Holladay's claim of fear in that he was obviously trying to separate himself from the complainant, and complainant acted aggressively. The evidence strongly suggests that complainant was motivated by anger toward Hollady for working too slowly and that he became verbally aggressive on more than one occasion.

The potential for workplce violence is real in our society and should be ignored by an employer. The resulting psychological impact on the victim must also be considered. The appointing authority approached this matter with an open mind and was intent on being fair while acting in the best interests of the agency and the individuals involved, including complainant.

That appointing authority did not find it necessary to draw a conclusion viv-a-vis the allegation that complainant poked Holladay in the chest. Substantial evidence together with reasonable inferences nevertheless support the appointing authority's conclusion that the written policy against workplce violence was violated by Collier. There is insufficient credible evidence from which to conclude that Holladay also violated that policy.

A permanent demotion or termination would not have been justified, but a temporary pay reduction under these circumstances was a reasonable exercise of discretion by the appointing authority. It is the responsibility of the appointing authority to determine the appropriate course of action to maintain employee discipline, efficiency and safety. There is not evidence of record from which to conclude that the appointing authority abused his

discretion. This administrative law judge is not persuaded that the judge is better suited in this case to exercise the responsibilities of personnel management than is the appointing authority who disciplined the complainant. See *Chiappe v. State Personnel Board*, 622 P.2d 527, 534 (Colo. 1981). The weight of the evidence supports the appointing authorities conclusions.

Neither party requested an award of attorney fees, and none is warranted.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed.

2. Respondent's action was not arbitrary, capricious or contrary to rule or law.

3. The discipline imposed was within the range of alternatives available to the appointing authority.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
July, 1997, at
Denver, Colorado.

Robert W. Thompson, Jr.

Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of July, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Brien Collier
3327 South Richfield way
Aurora, CO 80013

and in the interagency mail, addressed as follows:

Steven A. Chavez
Assistant Attorney General
State Services Section

1525 Sherman Street, 5th Floor
Denver, CO 80203
